Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

THE CLAYTON ACT

As indicated in the previous article[1] the tentative bills other than the Railroad Securities and Trade Commission measures were taken in charge by Representative Clayton's Committee on the Judiciary. These former measures constituted the basis of the Clayton act, now a part of the law of the land.[2]

[1] This article is the second of two studies of the new trust legislation. The preceding one, "The Trade Commission Act," appeared in the December number of the REVIEW (vol. IV, p. 840). The writer wishes to call attention to an error in the first article which was discovered too late to allow of correction. On page 852 read *Whitwell* v. *Continental Tobacco Co.* for *United States* v. *Nelson;* and in footnote 32 read 125 Fed. 454 instead of 52 Fed. 646.

[2] The legislative history of the Clayton act may be sketched as follows:

(Except where otherwise indicated all references in this footnote refer to pages in volume 51 of the *Congressional Record.* Page numbers alone have therefore been used. It should be noted that these page numbers are those of the *Record* as it appears from time to time and that they differ from the paging found in the bound volumes ultimately issued. The latter statement applies to the sketch of the legislative history of the Trade Commission act which appeared in the preceding number of the REVIEW. It was only recently that the writer discovered the discrepancy in the two pagings. He did not, therefore, make note of this point in the preceding article.)

On April 14, 1914, Representative Clayton introduced a general bill to supplement existing laws against trusts (H.R. 15657) and the bill was referred to the Committee on the Judiciary of which he was chairman (p. 7244). In this measure there were practically included the tentative bills drawn to cover trade relations, holding companies, and interlocking directorates (*cf.* text of tentative bills and also *Financial Chronicle,* vol. 98, p. 1210). On May 6 Mr. Clayton reported the measure with amendments accompanied by a report (no. 627) and both bill and report were placed on the House calendar (p. 8513). In several respects the amended measure differed from that originally offered on April 14. Alterations were made in the section relating to the issue of injunctions. Several clauses were added in the section prohibiting interlocking directorates, among them one providing that the section should not apply to mutual savings banks not having a capital stock represented by shares. The declaration of the earlier bill that nothing in the anti-trust laws should be construed to forbid the existence of labor unions, agricultural associations, etc., was extended by the new measure to include associations of the traffic, operating, accounting or other officers of common carriers for the making of lawful agreements.

On June 5 the bill was considered by the Committee of the Whole House on the State of the Union and passed 277 to 54 (p. 10,745). On June 6, together with the Trade Commission bill (H.R. 15,613), the Clayton bill (H.R. 15,657) was referred to the Senate Committee on Judiciary (p. 10,770). On July 22 Mr. Culberson reported out the bill with amendments accompanied by a report (no. 698) and the bill was placed on the calendar (p. 13,618).

Broadly speaking, the various sections of the Clayton act may be classified under three heads: (1) Those declaring certain acts unlawful and prohibiting them; (2) those designed to enforce

Several changes had been made in the measure as passed by the House on June 5. Easily the most important were the provisions giving to the Trade and Interstate Commerce commissions authority to enforce compliance with those sections prohibiting price discriminations, interlocking directorates, holding corporations, and exclusive and tying arrangements. Almost equally significant was the elimination of the fine and imprisonment penalties which the House measure had provided as punishments for violations of three of these sections, *i.e.,* those directed against price discriminations, holding corporations, and exclusive and tying arrangements. This amended measure was altered by the Senate in a number of respects. That body struck out entirely the provision forbidding price discriminations. It also in the Committee of the Whole eliminated the section prohibiting exclusive and tying arrangements but later adopted a substitute. A new section forbade common carriers, except under certain conditions, from having dealings to the extent of more than $50,000 a year with certain classes of concerns in which its own officers or agents were interested.

On the last day of August a unanimous consent agreement was secured for a vote on the Clayton bill (pp. 15,795-15,796) and two days later the measure passed the Senate by vote of 46 to 16 (p. 15,970).

In view of the several additions which were made by the Senate and the elimination of many of the clauses of the bill as it had passed the House, a disagreement was a foregone conclusion. On September 4, Representative Webb asked unanimous consent for a disagreement to the Senate's amendments and for a request for a conference. No objection being made, the chair appointed Representatives Webb, Carlin, Floyd of Arkansas, Volstead, and Nelson (p. 16,103). A message having informed the Senate of these facts, the motion of Senator Culberson that the Senate insist on the amendments and that the chair appoint conferees on the part of the Senate was agreed to. The vice-president thereupon appointed Senators Culberson, Overman, Chilton, Clark of Wyoming, and Nelson (p. 16,084).

On September 23 Senator Culberson presented the conference report on the Clayton measure (p. 17,018). But owing to the fact that in certain particulars the report was not sufficiently explicit to give directions to the enrolling clerk he withdrew it upon the following day and submitted a new report (p. 17,066). Several days of debate in the Senate followed, during which the conference report was strenuously attacked by Senator Reed of Missouri because of its elimination of criminal penalties. It was this fact that led him on October 5 to offer a motion to recommit the conference report with instructions to the Senate conferees to insist upon the insertion in the bill of the criminal penalties substantially as these had appeared in the House measure. The motion failed, 35 to 25 (pp. 17,694-17,697), and the Senate by a vote of 35 to 24 thereupon agreed to the report (p. 17,698).

In the House the conference report was presented on September 25 by Mr. Webb (p. 17,171). It met with objections similar to those raised by Mr. Reed in the Senate but was ultimately agreed to on October 8 by a vote of 244 to 54 (pp. 17,890-17,891). On the following day the measure

compliance with the prohibitions of the act; (3) those relating to legal processes, including the issue of injunctions, the prosecution of actions for contempt, etc.

The new law declares:[3]

A. That it shall be unlawful for any person engaged in commerce to make discriminations in prices between different purchasers of commodities sold for use, consumption, or resale, where the effect of the discrimination may be to substantially lessen competition or tend to the creation of a monopoly.[4]

B. That it shall be unlawful for any person engaged in commerce to lease, sell, or contract for the sale of goods, etc., patented or unpatented, or to fix a price charged therefor, or discount, or rebate, upon such price, conditioned upon the lessee or purchaser thereof, not using or dealing in goods, etc., of competitors of the lessor, or seller, where the effect may be to substantially lessen competition, or tend to create a monopoly.[5]

C. That no corporation shall acquire the whole or any part of the stock or other share capital of another corporation, or two or more corporations, where the effect may be to substantially lessen competition, to restrain commerce, or to tend to create a monopoly.[6]

D. From and after two years from the date of the approval of the act:

1. No person shall be a director or other officer or employee of more than one bank (etc.) organized under the laws of the United States if anyone of them is above a certain size; and no private banker, or person who is director in any bank or trust company organized under

was reported from the Committee on Enrolled Bills and was signed by the Speaker of the House and the Vice-president (pp. 17,955, 17,980). The bill was presented to the President on October 10 and was approved by him on October 16.

[3] Prohibitions. On account of the length of these they have not been quoted in full, but only their content given. All references except where otherwise indicated are to sections of the bill as reported by the conference committee.

[4] Sec. 2. Differences of prices, due to grade, quality or quantity, or which make due allowance for difference in cost of selling or transportation, or made in good faith to meet competition are specifically excepted.

[5] Sec. 3.

[6] Sec. 7. Specifically excepted from the operation of this section are corporations purchasing such stock solely for investment and not using it to substantially lessen competition; subsidiary corporations formed for the carrying on of lawful business or natural and legitimate branches thereof, where the effect of such formation is not to substantially lessen competition; common carriers aiding in construction of branch lines or acquiring or owning the stock of such branches, or of a branch line constructed by an independent company where there is not substantial competition between branch and main line companies; common carriers extending lines by the acquisition of the stock of other carriers where there is no substantial competition between the two.

the laws of any state, and above a certain size, shall be eligible as a director of any bank or banking association incorporated or operating under the laws of the United States.

2. No bank (etc.) organized or operating under the laws of the United States in any city, incorporated town or village, of more than 200,000 inhabitants shall have as director or officer or employee any private banker or any director or any other officer or employee of any other bank (etc.) located in the same place.

3. No person shall be a director at the same time in any two or more corporations (other than banks, etc., and common carriers) engaged in interstate commerce, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, if such corporations have been competitors so that the elimination of competition between them will constitute a violation of any of the provisions of the anti-trust laws.[7]

With regard to some at least of the principal prohibitions contained in the Clayton bill, the same argument may be made as was suggested against the unfair competition section of the Trade Commission bill, *i.e.*, that such provisions are unnecessary since the Sherman act embraces them in the same way, as it includes unfair methods of competition. Compare for example, the price discrimination section of the Clayton bill with the statement of the court in its decree against the General Electric Co.:

The General Electric Company and the other defendants are each enjoined and restrained from offering or making more favorable prices

[7] Sec. 8. Under Sec. 10 common carriers are forbidden after two years to have dealings in securities or supplies, etc., or to make or to have construction or maintenance contracts to the amount of more than $50,000 in the aggregate in any one year with another organization, when the common carrier has on its board of directors or as its president, manager, or purchasing or selling officer, or agent in the particular transaction, any person who is at the same time, a similar officer of or has any substantial interest in the organization from which the purchases are made, unless such dealings, etc., shall be with the most favorable bidder, who is to be ascertained by competitive bidding. Severe penalties are provided for the violation of this section. Such an interlocking between the officers or agents of a railroad and a supplying concern might result in other supplying concerns being unable to compete for the business of the road in question. In this way a relatively inefficient organization might be perpetuated, and a relatively efficient one prevented from attaining that development to which its efficiency entitles it.

In such circumstances we should clearly have a case of economically unfair competition which presumably at least is prohibited by the Trade Commission act. Although in consequence the provision under discussion may seem to be an instance of duplication, it is hardly that in reality. By making all except minor contracts open to competitive bidding it attempts to eradicate a situation out of which unfair competition might arise. It would seem therefore to be both a sound and a wise provision.

or terms of sale for incandescent electric lamps to the customers of any rival manufacturer or manufacturers than it at the same time offers or makes to its established trade, where the purpose is to drive out of business such rival manufacturer or manufacturers, or otherwise unlawfully to restrain the trade and commerce of the United States in incandescent electric lamps; provided that no defendant is enjoined or restrained from *making any prices for incandescent electric lamps to meet, or to compete with, prices previously made by any other defendant, or by any rival manufacturer.*[8]

The wording of section 3 of the Clayton act (B above), I think, clearly prohibits exclusive purchasing and selling, as well as tying arrangements. This section, therefore, has a twofold aspect. Regarding exclusive selling, a United States court had this to say in the recently decided Thread case:

The defendant corporations, together with their directors, officers, managers, agents, and employers . . . be and they hereby are jointly and severally enjoined . . . (i) From soliciting or exacting from wholesale or retail dealers or jobbers or from customers of competitors in the United States any agreement not to handle or to cease handling the brands of competitors; or from refusing to deal with, or discriminating against . . . those who handle the goods of competitors; or from canvassing the retail trade of any dealer or jobber and thereupon offering the orders thus obtained to such dealer or jobber upon condition that he shall cease to buy thread from a competitor of the defendants.[9]

Similarly a court decreed in the Electric Lamp case, regarding exclusive purchasing:

That the General Electric Company and the other above-named Lamp Manufacturing Defendants, and each of them, their officers, agents and servants, are perpetually enjoined and restrained from making or enforcing any contracts, arrangements, agreements or requirements with dealers, jobbers and consumers, who buy from the said defendants either tantalum filament, tungsten filament, metallized carbon filament or ordinary carbon filament lamps, or any of them, by which such dealers, jobbers and consumers are compelled to purchase all their ordinary carbon filament lamps from said defendants as a condition to obtaining such other types of lamps, or any of them, or by which dealers, jobbers and consumers are compelled to purchase any one or more of the above-mentioned types of lamps; . . . as a condition to the purchase . . . of any other or all of said types of lamps; and the said General Electric Company and . . . Defendants aforesaid are perpetually enjoined and restrained from discriminating against any dealer, jobber or consumer desiring to purchase tantalum, tungsten or metallized carbon filament lamps because of the fact that

[8] Italics are the writer's. *U. S.* v. *General Electric Co.*, Final Decree, U.S.C.C. for the Northern District of Ohio, Eastern Division, p. 9.

[9] *U. S.* v. *American Thread Co.*, Final Decree, U.S.D.C. for the District of New Jersey, p. 9.

such dealer, jobber or consumer purchases ordinary carbon filament lamps from others, and . . . from discriminating against any dealer, jobber or consumer desiring to purchase any one or more of the above-mentioned types of lamps because of the fact that such dealer, jobber or consumer purchases any other of said lamps from other manufacturers or dealers.[10]

Again, in view of the Northern Securities, the Oil and the Tobacco decisions one many not unreasonably contend that the provisions of the Sherman act are sufficiently broad to include acquisitions on the part of one corporation engaged in commerce of the stock of one or more others where in the words of the Clayton act "the effect of such acquisition may be to substantially lessen competition" between them "or to restrain such commerce · . . or tend to create a monopoly of any line of commerce." [11]

It would therefore appear possible for one to question whether very positive advantages have been secured by the provisions of the new law prohibiting price discriminations, exclusive purchasing and selling arrangements, and holding corporations. Would not the courts in any case coming before them have construed the Sherman act to embrace all these situations provided there was any substantial lessening of competition, restraint of trade, or tendency to create a monopoly?[12]

From the standpoint of the writer, price discriminations and exclusive and tying arrangements must be regarded as methods of unfair competition.[13] Since the Trade Commission act expressly declared unfair methods of competition to be unlawful, it follows that there is duplication involved to a considerable extent in declaring specific methods unlawful.[14]

In view, however, of the importance of the elimination of methods

[10] *U. S.* v. *General Electric Co.,* et al., Decree, *cit. supra,* pp. 7-8.

[11] Sec. 7.

[12] It is to be noted, however, that the acts now under discussion are prohibited not where the effect *"is"* to substantially lessen competition (etc.), but where the effect *"may be"* to do so. To the writer *"may be"* would seem to imply that the acts enumerated are prohibited if there is a possibility that competition will thereby be substantially lessened (etc.). If this view is a correct one, the new law will probably reach many acts to which the Sherman act could not possibly be construed to extend.

[13] Stevens, "Unfair Competition," *Pol. Sci. Quart.,* vol. XXIX, pp. 282, 460. See especially sections I, IV, V, and VI.

[14] It is but fair to say that the debates on the conference report show that some senators and congressmen recognized this fact. *Cf.* Senators Borah and Culberson in the original numbers of the *Cong. Rec.,* vol. 51, p. 17,297; and Representative Webb, p. 17,823.

of unfair competition, it seems highly probable that, if little has been gained by this duplication, at least no harm has been done. So far as tying arrangements are concerned, their prohibition by statute was necessary. As was pointed out by Senator Walsh, the Trade Commission

> could not declare the tying contract unlawful or assert that the use of it in connection with the sale or lease of or license to use a patented article constituted unfair competition, because the Supreme Court of the United States had approved of such a contract in the case of Henry against Dick . . . as being strictly within the rights of the patentee under the law as it stood.[15]

Interlocking directorates have never been, so far as the writer knows, declared unlawful by any specific decision of the courts, although some dissolution plans have temporarily forbidden such arrangements as to the separate units into which an illegal organization has been split.[16]

It would be too broad a generalization to assert that the interlocking of directors constitutes unfair competition. But though not unfair, *per se*, it is none the less true that such an arrangement may result in unfairness through the fact that an interlocked concern may thus be enabled to purchase at preferential rates as compared with its competitors.[17] Although this fact alone would appear to constitute a sufficient economic reason for the prohibition of interlocking directors, would not any sound interpretation of the unfair competition section of the Trade Commission act extend to all cases of this character? Is not a needless duplication, therefore, also involved in this case?

Both these questions may, I think, be answered in the affirmative. Yet it should not be forgotten that many preferential contracts would probably never have been made but for the existence of interlocking directors. From this standpoint the prohibition appears essentially sound. It goes to the root of the matter by attempting to eradicate a class of conditions which has undoubtedly been responsible for certain preferential contracts. At the

[15] *Ibid.*, p. 17,689.

[16] During a period of five years, "None of said corporations shall have any officer or director who is also an officer or director in any other of said corporations." *U. S.* v. *E. I. DuPont de Nemours & Co. and others.* Opinion of the Court and Final Decree, U.S.D.C. for the District of Delaware, p. 12. A similar provision will be found in the Tobacco Dissolution plan.

[17] *Cf. op. cit.* Stevens, sec. VI, p. 462, and also *U. S.* v. *American Can Co.* Original Petition, U.S.D.C. for the District of Maryland, pp. 18-19.

same time is is scarcely necessary to point out that interlocking directors are not a *sine qua non* for securing either preferential contracts or centralization of control in the management of the affairs of certain large corporations. Dummy directors have existed in the past and will continue to exist. Through brothers, sons, and more distant relatives and also through friends, the same ends may and not infrequently will be obtained as have been secured in the past through the medium of interlocking directors.

Enforcement. Two methods of treating violations of the principal prohibitions[18] of the Clayton act are provided. Section 11 declares that the authority to enforce compliance with the sections containing these prohibitions

> is hereby vested in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce.[19]

The manner of the exercise of the authority thus given is in all respects identical with the procedure of the Trade Commission in preventing unfair competition. And since the latter has been fully outlined in the preceding article[20] it need not be repeated here.

As indicated above, the courts have construed the Sherman act to embrace price discriminations, exclusive arrangements, and holding corporations. It might therefore be contended, were the Trade Commission given the sole power of enforcing compliance with these prohibitions, that this body in so doing is merely the successor to functions that were formerly exercised by the district and circuit courts of the United States; and consequently that nothing has been gained by vesting these powers in the Trade Commission. A similar point was made, it will be recalled, regarding the authority of the Trade Commission over unfair methods of competition.

In general, arguments similar to those which the writer indicated in favor of vesting in the Trade Commission the power over unfair competition, may also be advanced to support the authority given to this body of enforcing compliance with the prohibitions of price

[18] Price discriminations, "tieing" and exclusive arrangements, holding corporations and interlocking directorates.

[19] Sec. 11. The writer has omitted from the remainder of the discussion any consideration of this section as applied to banks and common carriers.

[20] American Economic Review, vol. IV (Dec., 1914), pp. 850-851.

discriminations, exclusive and tying arrangements, interlocking directorates, and holding corporations, *i.e.*:

(a) That there is some administrative advantage in having these prohibitions handled through the commission with direct and final appeal[21] to the Circuit Court of Appeals, etc., instead of leaving enforcement to the ordinary mechanism of the Department of Justice and the courts.

(b) That the commission ought and probably will be able to discover and prohibit infractions of the principal acts made unlawful by the Clayton measure, in a much more thoroughgoing fashion than was possible through the Department of Justice and the courts, because of the broader powers of investigation which the commission possesses and the larger force of investigators which it may be assumed that it will have at its disposal.

Apparently, then, the section under discussion should considerably enlarge and increase the administrative authority of the Trade Commission. This would still be true even though it were assumed that the enforcement of the prohibitions of local price cutting and exclusive and tying arrangements were embraced by the unfair competition section of the Trade Commission bill. In such case the commission would still exercise administrative authority over both holding corporations and interlocking directorates. Its powers, therefore, would appear to be considerably greater than those originally granted by the measure creating it. But whether as a matter of actual fact, the Clayton law has measurably extended the powers of the Trade Commission must, I think, remain somewhat problematical. The reason for this is found in the fact that the Trade Commission is not given sole authority to enforce compliance with the principal prohibitions of the Clayton act. Section 15 of the new law provides, without making any exception of the enforcement of the provisions entrusted to the Trade Commission under section 11:[22]

That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited.

[21] Except in case of a writ of *certiorari* from the Supreme Court.

[22] And also to the Interstate Commerce Commission in the case of common carriers and the Federal Reserve Board in the case of banks.

It appears, therefore, that both an administrative and a judicial authority are provided for enforcing compliance with the prohibitions under discussion. That it was intended to give the district courts and Trade Commission concurrent jurisdiction and not to vest this authority solely in the commission is undoubtedly true,[23] but what advantages this division of jurisdiction will afford, it is a little difficult to comprehend. True, there might be violations of the act other than those of which the Trade Commission is given jurisdiction, but the latter cases might easily have been excepted from the operation of section 15, thereby securing such advantages as ought, in the estimation of the writer, to accrue from the arrangements provided in section 11. Why, after providing through the Trade Commission a complete and on the whole commendable mechanism for enforcing compliance with these sections, was it regarded as either necessary or advantageous to provide another means of enforcement? The only possible ground which the writer is able to suggest is that it was thought that enforcement might perhaps be facilitated by having both the commission and the Department of Justice on the watch for violations. On the other hand, is not this possible advantage of concurrent jurisdiction more than offset? The effect of section 11, taken by itself, was to considerably strengthen and increase the administrative power of the Trade Commission by giving it authority over the enforcement of the principal prohibitions of the Clayton act. This certainly seems desirable since we are to have a Trade Commission. But it is possible to escape the conclusion that this increased administrative authority is and will be, at least to a considerable extent, nullified by the provisions of section 15 investing the judicial branch of the government with a concurrent jurisdiction in that enforcement?[24]

[23] *Cf.* statements of Representative Webb of the conference committee in the original numbers of *Cong. Rec.*, vol 51, p. 17,824. The writer also has a letter from a member of the conference committee stating that it was intended to give concurrent jurisdiction.

[24] It should, of course, be pointed out that only the actual results of the operation of these two sections can determine the question. It may happen that the complaints of various parties will be made in practically all cases to the Trade Commission. A fact which would seem to militate against this result is that under the Sherman act it has for years been customary for complaints to be made to the Department of Justice or its officials. It seems not unreasonable to assume, therefore, that there is some likelihood that such will continue to be the practice, at least until people become more familiar with the Trade Commission as an enforcing authority. On the other hand it is, of course, true, since the initiation of proceedings in such

A fact which points strongly to an affirmative answer to this question is the somewhat peculiar and, in the estimation of the writer, unfortunate situation in the matter of appeal, which seems to have been created by this concurrent provision. As we have seen, the Circuit Court of Appeals, under section 11, has final and exclusive jurisdiction[25] of orders of the Trade Commission relating to price discrimination, exclusive and tying arrangements, holding corporations and interlocking directorates. If, however, cases involving these points come before the district courts, under section 15 they go directly from these courts to the Supreme Court upon appeal. This situation arises through the following facts. The expediting act of February 11, 1903, provided that in every equity proceeding brought in the circuit courts by the United States as complainant, under the Sherman act, the Interstate Commerce act "*or any other acts having a like purpose that hereafter may be enacted,*" an appeal would lie *only* to the Supreme Court.[26] The act of March 3, 1911, which abolished the circuit courts, declared that "Whenever, in any law not embraced within this act, any reference is made to . . . the circuit courts, such reference shall . . . be deemed and held to refer to . . . the district courts."[27]

It therefore appears, so far as the writer is able to see, that both the Supreme Court and the Circuit Court of Appeals have the power to render *final* decisions upon the principal prohibitions of the Clayton act, and that the one or the other will render them according as the particular case is brought through the District Courts or the Trade Commission. Is it then to be expected that an order of the Trade Commission even though backed by the decision of the Circuit Court of Appeals will command respect until or unless the same point has arisen in another case in the courts and the Supeme Court has rendered a decision thereon affirming that of the Circuit Court of Appeals.

cases must rest with the Department of Justice, that the instructions of the President to the Attorney General might result in but few cases being brought through the district courts and in the complaining parties being referred to the Trade Commission. Other factors may also have considerable effect, such as the amounts of money appropriated to the Department of Justice for enforcing the laws, etc.

[25] Except in case of *certiorari* from the Supreme Court.

[26] 32 Stat. Law 823. Italics are the writer's. The act of 1910 amending this act did not alter this provision.

[27] Act of March 3, 1911; in effect Jan. 1, 1912.

It also follows, I think, on account of section 15, that so far as sections of the act deal with methods of competition which may be regarded as unfair, the jurisdiction of the Trade Commission over this matter is a concurrent one, and not, as might be inferred from the Trade Commission bill, an exclusive one. The same thing obviously is also true of the jurisdiction of the Circuit Court of Appeals over the orders of the Trade Commission relating to the same subject.

The Clayton measure as passed is practically free from criminal penalties.[28] Hence, enforcement of its prohibitions rests principally upon contempt proceedings for disobedience to the decrees of the courts[29] as is the case with the enforcement of the unfair competition section of the Trade Commission act. Except so far as unfair competition is concerned, the writer is not strongly impressed with the need of other penalties than those afforded by contempt procedure.

Other provisions of the Clayton act may also have some effect upon its enforcement. Thus:

> A final judgment or decree hereafter rendered in any criminal prosecution . . . or proceeding in equity brought by and on behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be *prima facie* evidence against such defendant in any suit or proceeding brought by any other party against such defendant . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto.[30]

This provision is further strengthened by a clause in the same section providing (whenever the United States begins action) for the suspension during the pendency thereof of the running of the statute of limitations in respect to private rights of action based upon the complaint in the said action. The original House measure had provided that a judgment in favor of the United States should be "conclusive evidence of the same facts" and "the same questions of law in favor of any other party."[31] Since this clause would seem to be of questionable constitutionality, it is

[28] The House measure provided fines and imprisonment or both as penalties for price discriminations, holding companies, interlocking directorates, and exclusive and tying arrangements. All these penalties, however, were eliminated either by the Senate or the conference committee.

[29] Unless the criminal clauses of the Sherman act were invoked. This could, of course, be done in every case where a contract, combination, or conspiracy in restraint of trade or monopolization, etc., could be shown.

[30] Sec. 5. Certain exceptions are made in the case of pending suits.

[31] Sec. 6 of the Clayton bill as it passed the House.

likely that the change to the provisions of the conference measure mentioned above was a wise one.[32]

Section 14 provides that the violation of the penal provisions of the anti-trust acts by a corporation is to be deemed also that of the directors and others authorizing the act, and provides a fine of $5000 or imprisonment not exceeding one year, or both. That this personal guilt section will have any appreciable effect upon the enforcement of the law is rather doubtful. The punishment is no more severe than that provided by the criminal clause of the Sherman act. Over and over again individuals have been proceeded against criminally under that act, and have been convicted and sentenced by the courts. Since the Sherman act still remains in force it seems doubtful if this provision was particularly necessary, or if it will have important results.

Section 4 permits the recovery of threefold damages for injury by reason of anything forbidden in the anti-trust laws. This section is merely a reënactment of section 7 of the Sherman act, but applies to all the anti-trust laws instead of merely to the Sherman act as was, of course, the case with the last-mentioned section. An additional protection, which is afforded to the individual by the new law is found in the provision:

> That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws . . . when and under the same conditions and principles as injunctive relief . . . is granted by courts of equity . . .[33]

Most people will be inclined, I think, to pass a favorable judgment upon these provisions. In enabling the individual to better protect himself, they may and very probably will tend to decrease the number of violations of the anti-trust laws.

A final point regarding the enforcement of trust legislation in general should be noted. It would seem likely that the omission of practically all criminal penalties from the new laws will tend to result in their being enforced rather by civil procedure than by criminal process. While it is true that the Sherman act remains in force, the new legislation so clearly indicates civil process as the remedy to be pursued that it seems scarcely likely that violations of the new laws will be prosecuted criminally[34] even though they at

[32] These were similar to the provisions substituted by the Senate for the original House provisions.

[33] Sec. 16.

[34] Except as to the enforcement of sections 9 and 10 which relate to common carriers.

the same time constitute violations of the act of 1890. May there not also be a tendency, partly as a result of this situation, to prosecute civilly rather than criminally such violations of the Sherman act, if any, as could not be regarded as coming within the scope of the provisions of the new legislation? It seems highly probable that the new laws mark a turning point in the attitude toward trusts; that criminal penalties are no longer to be relied upon for the enforcement of trust legislation, but that in the future this is to be handled entirely through civil suits in the courts or else by an administrative body, the Trade Commission. This in turn appears to point to the ultimate result that the control of trusts will be vested entirely in an administrative board.

Procedural and other sections. The sections of the act that have not already been discussed relate to judicial processes, procedure, etc. Consideration of these provisions will be omitted because of their relative unimportance in trust regulation and also in order not to expand unduly this article. Their content, however, may be briefly summarized: Suits under the anti-trust laws against a corporation may be brought in any district where the corporation may be found,[35] and, in the case of suits brought by the United States, subpoenas shall run to districts other than those where the suit is instituted.[36] Sections 17 to 20, inclusive, deal with injunctions, the methods and conditions of issue, etc. These sections prohibit their use in labor disputes growing out of the terms and conditions of employment, unless necessary to prevent irreparable injury to property rights for which there is no adequate remedy at law. They also forbid their use in such disputes against strikes and picketing and boycotting, which are specifically declared not to be violations of any law of the United States. Sections 21 to 25 relate to contempts, contempt procedure, and punishments in suits other than those brought by or on behalf of the United States. Section 6 declares that the labor of a human being is not a commodity or an article of commerce and excepts from operation of the anti-trust laws, non-stock labor, agricultural, and horticultural associations not conducted for profit.

The following conclusions with reference to the new trust legislation may be drawn from the discussion presented in the present and preceding article.

[35] Sec. 12.

[36] Sec. 13. Under certain conditions.

1. The Trade Commission is a body with wide powers of investigation and a limited administrative authority.

2. Several of its investigatory powers have to a noticeable degree been previously exercised by either the Bureau of Corporations or the Department of Justice. But on the whole the investigatory authority of the commission is considerably greater than that possessed in the past by either or both of these other bodies.

3. The commission is given the powers of making recommendations to the Attorney General for the readjustment of the business of corporations violating the anti-trust acts and also of ascertaining and reporting appropriate decrees in equity suits brought by or under the Attorney General. But the exercise of these functions depends in the first case upon the application of the Attorney General and in the second case upon the reference of the suit by the courts to the commission. No such discretionary powers should have been given to either the Attorney General or the courts, but both these acts should have been made mandatory in all cases involving readjustments or decrees. In addition it should have been made mandatory upon the Attorney General to accept such recommendations as the commission might make for effecting the readjustment of any business. Nothing would have been lost by making these requirements, and the dignity and importance of the commission would have been increased.

4. The Trade Commission act gave the commission a most important administrative authority in providing that this body should prevent unfair methods of competition. The Clayton measure further extended this authority in giving it jurisdiction to enforce the prohibitions against holding corporations and interlocking directorates. It also gave it jurisdiction to prevent price discriminations and exclusive and tying arrangements. The authority to prevent price discriminations and exclusive arrangements, however, does not properly constitute any increase in the commission's powers since any sound construction of the unfair competition section of the Trade Commission act could scarcely fail to include these methods. While tying arrangements are also unfair it is at least doubtful, in view of the Dick decision, whether it would have been possible for the Trade Commission to have prevented them without the authority thus conferred. This provision, therefore, may be regarded as a wise precautionary measure.

5. The enforcement of the principal prohibitions of the Clayton

act and of the unfair competition section of the Trade Commission act is entrusted to the commission by an admirable method of procedure. The commission conducts a hearing and makes an order against a practice, a review of which may be had by the party against whom it is made in the Circuit Court of Appeals. If the order is not obeyed the commission applies to the same court for enforcement, and the jurisdiction of the court in both cases is exclusive and final.[87]

6. Unfortunately a concurrent jurisdiction has been vested in the district courts to enforce the prohibitions against price discriminations, exclusive and tying arrangements, holding corporations and interlocking directorates. It is extremely doubtful if this will serve any useful purpose. At the same time it is possible, if not probable, that it will affect adversely the prestige of the commission. It is also unfortunate in providing two different courts of final review upon these practices, *i.e.*: the Circuit Court of Appeals when the Trade Commission makes orders against these practices; the Supreme Court when a district court enjoins them.

7. The new laws rely primarily upon contempt proceedings and the penalties therefor in the matter of enforcing their prohibitions. The sufficiency of such arrangements must, I think, depend largely upon one's personal estimate. Sherman act experience indicates that the courts have been inclined in imposing sentence to take a very tolerant view of violations of that measure. If the same attitude is taken in imposing sentences for contempts of court in cases arising under the new laws, it may certainly be doubted if these arrangements are adequate.

8. The elimination of criminal penalties from several sections of the Clayton act and the lack of any such provisions as punishment for unfair methods of competition clearly point to civil rather than criminal procedure as the remedy to be invoked in cases of violations of the principal prohibitions of the new legislation. This again, coupled with the fact that the new laws provide for a Trade Commission with jurisdiction over their important prohibitions, points to a policy of administrative regulation of the trusts. This, I believe, is still true in spite of the concurrent jurisdiction provided for in Section 15 of the Clayton act. This section might readily be construed as merely indicating a reluctance to accept fully the principle of administrative regulation. Ulti-

[87] Subject to the exceptions stated under 6 below.

mately, unless the Trade Commission is abolished either directly or indirectly, this concurrent jurisdiction will probably be abolished or else rendered nugatory through the non-action of the officers of the Department of Justice.

9. The powers given to the Trade Commission of classifying corporations and prescribing the form of reports are pregnant with possibilities. Through these powers it would appear possible for the Trade Commission to determine with some correctness the relative economic efficiency of competition on the one hand and combination and monopoly on the other. Even if no such broad determination can be arrived at for industry in general we ought at least to be able to learn in what types and kinds of business the one or the other principle is the more efficient. In this way light will be shed upon the soundness of such measures as we have already taken for trust regulation and of those which we may take in the future.

10. The provisions of the new legislation in the direction of enabling individuals to better protect themselves against loss or damage by reason of violations or threatened violations of the anti-trust acts are commendable as is also the reënactment, now applied to violations of any of the anti-trust acts, of the threefold damage clause of the Sherman act.

W. H. S. Stevens.

Columbia University.